Supreme Court, U.S.
FILED
MAR 21 1997

(3)

No. 96-1332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and DOUGLAS K. HAMLIN
conservator of the estate of Cinda S. Karjala,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Norfolk Southern Railway Company, has consented to AAR's filing of a brief.[1] Respondents, Lang and Hamlin, have refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and

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[1] The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

Grade crossings have a pervasive presence on the rail network, existing wherever trains operate. Thus the establishment and preservation of clear and uniform rules regarding railroad responsibility at crossings is a matter of great importance to the railroad industry. AAR filed two briefs before this Court in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993), a case involving the preemptive effect of the Federal Railroad Safety Act on railroad duties at crossings arising under state tort law.

Numerous lower court decisions applying *Easterwood* have followed. Because large railroads operate in many states, each such decision typically has impacted multiple AAR members. AAR has, therefore, maintained a continuing interest in this issue, and in the application of this Court's *Easterwood* decision by lower courts. This is evidenced by AAR having filed briefs in a number of cases in both state and federal court where the scope of federal preemption was at issue.[3]

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue.

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[2] *E.g., Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337 (2nd Cir. 1996), *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See Hughes* v. *CSX Transp., Inc.*, 83 F.3d 420 (5th Cir. 1996); *Hester* v. *CSX Trans., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1996); *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1963 (1995); *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994); *Shanklin* v. *Norfolk Southern Ry.*, No. 94-01212 (W.D. Tenn. 1996), appeal pending, 6th Cir., No. 96-6371; *Pearson* v. *Columbus & Greenville Ry.*, 672 So.2d 773 (Miss. App. 1995); *Union Pacific R.R. v. Sharp*, No. 96-1096 (Ark. S. Ct.) (AAR motion for permission to file amicus brief granted, Jan. 21, 1997).

This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

In this case, the lower court misread this Court's *Easterwood* decision. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is grade crossing safety and the litigation that frequently ensues as a result of accidents between trains and motor vehicles at grade crossings. As of 1995, there were 163,917 public grade crossings on the nation's rail system.[1] Tragically, accidents at crossings are a daily event. Though crossing safety has improved markedly in the past two decades, there are still about 4000 accidents between trains and motor vehicles at crossings each year, resulting in nearly 2000 injuries and over 500 fatalities.[2]

Commonly, when a train-vehicle accident occurs at a grade crossing, one or more of AAR's members are sued in a state-law tort action. In 1995, crossing accidents resulted in 3,134 claims and 626 lawsuits against railroads; that year about $127 million was paid out by the industry in connection with such claims.[3] Litigation typically involves questions about which party is responsible for various aspects of crossing safety. Allegations, like those made in the cases at bar, that the railroad failed to provide adequate warning devices at the crossing, are almost a given in crossing litigation.

In *CSX Transp., Inc.* v. *Easterwood* 507 U.S. 658 (1993), this Court addressed the question of whether and when the Federal Railroad Safety Act of 1970 (FRSA) and regulations issued by the Secretary of Transportation preempt state law duties with regard to crossing warning devices.[4] The court below, confronted with a seemingly

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[1] Federal Railroad Administration, Highway-Rail Crossing Accident/Incident and Inventory Bulletin, No. 18, Calendar Year 1995, at 64, Table 33 (Sept. 1996). (Accident/Incident Bulletin)

[2] *Id.* at 33, Table 4, for 1995 data.

[3] Association of American Railroads, 1995 Claim & Litigation Report 2-18 (May 1996).

[4] *Easterwood* addressed two laws enacted by Congress to combat the then-growing problem of grade crossing accidents. The first was FRSA. Pub. L. No. 91-548. 84 Stat. 971 (1970) (originally codified as amended at 45 U.S.C. § 421, *et seq.*), reenacted in the

straightforward application of *Easterwood*, chose not to follow this Court's decision and reversed two trial courts which had ruled that plaintiffs' state law claims were preempted. The result is to reimpose duties on railroads (with concomitant liability for breach of those duties) where this Court had previously ruled they do not exist. The serious financial consequences that flow from this decision, and the frequency with which this issue arises in state and federal court, makes this case of utmost interest to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *CSX Transp., Inc.* v. *Easterwood*, this Court held that where federal funds have participated in the installation of a crossing warning device, state law seeking to impose on railroads a duty to select and install devices is preempted. The court below ignored the essence of the *Easterwood* decision, ruling that even though the warning devices at the crossings at issue were federally funded, preemption was not a defense since the accidents occurred during foggy conditions and when the warning devices may have been otherwise obscured. This ruling completely eviscerates *Easterwood*, erroneously treating preemption as an evanescent doctrine that shifts with local conditions. The ruling below threatens dramatically to expand railroad liability for grade crossing accidents and to recreate the state of confusion regarding railroad responsibility at

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Act of July 5, 1994, Pub. L. No. 103-272, § 1(e), 108 Stat. 863 (now codified at sections of 49 U.S.C. § 20101, *et seq.*). FRSA's preemption provision (originally 45 U.S.C. § 434) is now codified at 49 U.S.C. § 20106. The second was the Highway Safety Act, 23 U.S.C. § 101, *et seq.*, and in particular, the 1973 amendment thereto, as codified at 23 U.S.C. § 130(d), the precursor of the federal Grade Crossing Program. The regulations at issue in *Easterwood* were promulgated under FRSA and § 130(d).

crossings that existed prior to this Court's *Easterwood* decision.

ARGUMENT

I. THE MISREADING OF *EASTERWOOD*'S STRAIGHTFORWARD TEST FOR FEDERAL PREEMPTION BY THE COURT BELOW UNDERMINES THE UNIFORM APPROACH TO CROSSING SAFETY ESTABLISHED BY THIS COURT

Prior to ruling in *Easterwood*, a great deal of confusion existed regarding railroad duties at crossings, and the existence and applicability of preemption under FRSA.[5] This Court addressed that issue, examined the various federal regulations relating to crossing safety, and established a rule that focused on the use of federal funds as the preemptive trigger. After analyzing 23 C.F.R. § 646.214(b)(3) and (4), this Court concluded that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed", covering "the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671.[6] Thus, where federal funds have participated in the installation of a crossing warning device, state law seeking to impose on railroads a duty to select

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[5] Prior to this Court's 1993 decision, four federal courts of appeal had taken different approaches to this issue. *Hatfield* v. *Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992); *Easterwood* v. *CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991); *Karl* v. *Burlington Northern R.R.*, 880 F.2d 68 (8th Cir. 1989); *Marshall* v. *Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983).

[6] Sections 646.214(b)(3) and (4) require that automatic gates and flashing lights be installed as part of any improvement project when certain conditions pertaining to the crossing are met, or, when such conditions are not met, that the type of warning device to be installed be subject to the approval of the Federal Highway Administration.

and install devices is preempted pursuant to 45 U.S.C. § 434.[7]

The trial court in the *Lang* case below recognized the impact of *Easterwood*. In granting summary judgment to Petitioner, the court stated that "preemption arises from the exercise of [federal] authority" which is "established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices." Pet. Br. at 33a.

Unlike the trial court, however, the Alabama Supreme Court ignored the essence of the *Easterwood* decision.[8] Its holding that even though the warning devices at a crossing were federally funded, preemption was not a defense since the accident occurred during foggy conditions and when the warning devices may have been other-

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[7] *Easterwood* also examined the regulations at 23 C.F.R. pt. 924 (requiring as a condition of receiving federal aid that states establish a highway safety program, to include ranking of crossing hazards) and 23 C.F.R. § 646.214(b)(1) (requiring compliance with the Manual on Uniform Traffic Control Devices), but concluded that they did not cover the subject matter of state law with respect to the selection and installation of warning devices. (To be consistent with Petitioner's brief and the opinion below, AAR shall refer to FRSA's preemptive provision as § 434 even though it has recently been recodified. *See* Pet. Br. at 5, n.3.)

[8] The Alabama Supreme Court relied on this Court's general admonition that preemption will not attach unless it is the clear intent of Congress to preempt state law. However, it failed to appreciate that this Court has already ruled that Congress clearly *did intend* preemption when federal funds participate in the installation of crossing warning devices. Not surprisingly, its holding is at odds with recent decisions of several federal courts of appeal. *See Hester* v. *CSX Transp., Inc.*, 61 F.2d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1966); *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995). *See* Pet. Br. at 12-13.

wise obscured, completely eviscerates *Easterwood*.[9] The ruling suggests the absurd result that state tort claims are preempted on a clear day, but not when the weather changes. Under this rationale, another lower court might find that preemption evaporates if the railroad failed to warn of snowy or rainy conditions.

The notion that the preemptive effect of § 434 can be modified by weather or the alleged condition of a warning device, reduces a direct holding of this Court, as Petitioner notes, to a matter of semantics. These "facts" have no impact on preemption; in fact, crossing conditions like weather and visibility are factors taken into account when the federal authorities approve a particular warning device. This Court was clear that the test of preemption with regard to adequacy of warning device claims is the presence of federal funds. The court below did not dispute that this requirement was satisfied with respect to both cases, yet it reversed the summary judgment orders recognizing preemption.[10] Under this holding, simply by alleging that a railroad failed to warn about a condition or maintain the device, a state law claim, preempted under *Easterwood*, is resuscitated. Preemption is not such an evanescent doctrine.

If the ruling below is allowed to stand railroads will never know when and whether they retain state law duties

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[9] *See Williams* v. *Alabama Great Southern R.R.*, 1994 U.S. Dist. LEXIS 11024 (E.D. La.), rejecting the assertion that the presence of fog may serve to override the preemptive effect of the Secretary's regulations.

[10] The court relied on the rationale in *Michael* v. *Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), but did not explain how the rational in *Michael* was applicable to the cases at bar. In *Michael*, the Eleventh Circuit held that preemption was not a defense where there was evidence that the railroad failed to install devices which conformed to the specifications approved by FHWA. Assuming *arguendo* that *Michael* is correct, it is nonethless distinguishable: in the cases at bar, there were no allegations of failure to comply with federal specifications.

regarding the adequacy of warning devices. The legal landscape will more closely resemble the days prior to *Easterwood* when the responsibilities of various parties for crossing safety were vaguely defined. A return to confusion and lack of uniformity will not just impact the railroads, it is inconsistent with the goals of the federal Grade Crossing Program.[11] This Program, which requires states to identify hazardous crossings and prioritize upgrade projects, rests on the notion that responsibilities at grade crossings should be clearly established.[12]

The decision below, by itself, will have wide-ranging effects in Alabama alone. Twenty one railroads operate over 3300 miles of track containing 3610 crossings in the state of Alabama.[13] Crossing accidents are, unfortunately, not uncommon. In 1995, there were 164 crossing accidents between trains and motor vehicles at those crossings.[14] The state supreme court has given litigants in Alabama carte blanche to plead around *Easterwood* by alleging that the railroad has failed to warn about a hazard or to maintain a warning device, notwithstanding that

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[11] 23 U.S.C. § 130(d). *See* Pet. Br. at 4-6.

[12] Section 130(d) required, for the first time, that states be responsible for surveying to identify problem crossings and implementing improvement projects. This was in response to a FRSA-mandated USDOT Report (Railroad-Highway Safety Part II: Recommendations for Resolving the Problem. (August 1972)), which criticized the outmoded state-law concept of dividing responsibility between railroads and state agencies as having resulted in a fragmented approach toward safety. The Report focused on the anomaly involved in the traditional state-law imposition of joint responsibility at grade crossings. *Id.* at 33.

[13] Association of American Railroads, Railroads and States 18 (data on railroads and trackage) (1995 data is from AAR database supporting this publication, but not yet in published form); Accident/Incident Bulletin at 72, Table 45 (data on number of crossings).

[14] Accident/Incident Bulletin at 33, Table 4.

the devices at the crossing were installed with federal funds.

Of course, as a rule of law, the decision of the Alabama Supreme Court threatens dramatically to expand railroad liability for grade crossing accidents beyond anything this Court approved in *Easterwood*. In sum, the Court should grant review of the decision below in order to ensure that the rule in *Easterwood* is not relegated to a mere pleading requirement that provides no meaningful guidance to federal regulators, railroads and state highway officials concerning their respective responsibilities in promoting safety at railroad crossings.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Supreme Court of the State of Alabama in this case be granted.

Respectfully submitted,

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